Office-Supreme Court, U.S.
FILED
OCT 7 1957
JOHN T. FEY, Clerk

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1957

No. 531

IN THE MATTERS

OF

SEABOARD AIR LINE RAILROAD COMPANY,

Petitioner,

v.

JAMES M. BRADDOCK,

Respondent.

SEABOARD AIR LINE RAILROAD COMPANY,

Petitioner,

v.

VIRGIL BRADDOCK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Florida entered in these causes.

OPINION BELOW

The trial Court delivered no opinion.

These causes were first appealed by respondents to the Supreme Court of the State of Florida from an order of the trial Court granting new trials. The opinion of the Supreme Court of Florida on that appeal reversing the trial Court has been reported in 80 So. 2d 662. A copy of this opinion is attached as Appendix I.

The petitioner then appealed to the Supreme Court of Florida from the final judgment entered by the trial Court pursuant to the mandate of the Supreme Court of Florida in the first appeal. The Supreme Court of Florida affirmed without opinion on the second appeal but there was a dissenting opinion. all of which has been reported in 96 So. 2d 127. A copy of this opinion is attached as Appendix II.

JURISDICTION

The judgment of the Supreme Court of Florida was entered May 8, 1957; an order denying rehearing was entered July 11, 1957. A copy of this judgment is attached as Appendix III.

Jurisdiction to issue the writs rests on Title 28, United States Code, Section 1257(3).

QUESTION PRESENTED

WHERE THE RECORD OF A FIVE DAY JURY TRIAL AFFIRMATIVELY SHOWS NUMEROUS INFLAMATORY AND HIGHLY PREJUDICIAL REMARKS BY RESPONDENTS' COUNSEL IN THE PRESENCE OF THE JURY EXTENDING FROM THE BEGINNING OF THE TRIAL TO ITS CONCLUSION, AND FURTHER AFFIRMATIVELY SHOWS THAT THE TRIAL COURT, DESPITE NUMEROUS OBJECTIONS BY PETITIONER, PERMITTED SUCH REMARKS AND CONDUCT TO CON-

TINUE WITH NO ADMONITION TO RESPONDENTS COUNSEL, DID NOT THE CUMULATIVE EFFECT OF SUCH IMPROPER CONDUCT AND REMARKS RENDER IT IMPOSSIBLE FOR THE TRIAL COURT TO PURGE THE MINDS OF THE JURORS OF THE PREJUDICIAL EFEECT AND DENY TO THIS PETITIONER ITS RIGHT TO A FAIR AND IMPARTIAL TRIAL, AS GUARANTEED BY ARTICLE I OF THE FOURTEENTH AMENDMENT TO THE CONSTIUTION OF THE UNITED STATES.

CONSTITUTIONAL SECTION INVOLVED

Article I, Fourteenth Amendment, Constitution of the United States:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

STATEMENT OF THE CASE

These actions were brought by respondents to recover damages for the alleged negligence of petitioner in causing permanent injury to respondent James M. Braddock, a minor.

The respondent, Virgil Braddock, is the father of James M. Braddock. The accident complained of occurred in Miami, Florida, when James M. Braddock rode his bicycle over petitioner's railroad crossing at 26th Street and was struck by a switch engine.

The cases were consolidated and tried together before a

jury in Miami. During the respondents' closing argument to the jury, counsel for respondents used a large placard to illustrate the cash remuneration expected for various items of damage. A photograph of the placard used in the James M. Braddock case is attached as Appendix IV and a photograph of the placard used in the Virgil Braddock case is attached as Appendix V. As the Supreme Court of Florida commented in its opinion on the first appeal, these cases are unique in that it is possible to ascertain the exact amount computed and awarded by the jury for each element of alleged damages requested by respondents, since the jury returned a verdict in the James M. Braddock case for $248,439.00,* the exact total of the amounts itemized by respondents' attorneys on the placard. In the Virgil Braddock case the jury returned a verdict for $6,500.00, only $70.00 less than requested by respondents' attorneys on the placard used in that case. Both cases were submitted to the jury under the Florida Comparative Negligence Statute.

The trial of these cases took five days and was completely permeated by extraneous remarks of the respondents trial counsel in the presence of the jury which were improper, highly inflammatory, prejudicial to petitioner and argumentative. The remarks and conduct of respondents' attorney were directed to petitioner and petitioner's witnesses and employees and this pattern of conduct was followed for the sole purpose of influencing the jury by an improper appeal to sympathy, passion and prejudice. The success of these tactics by respondent's counsel is beyond doubt as evidenced by the monstrous verdict returned by the jury for the exact amount requested by respondents in the minor's suit and by

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*On the first appeal (80 So. 2d 662 - Appendix I) the Supreme Court of Florida reduced the amount awarded by the jury for loss of future earnings, ruling that such award should have been reduced to its present cash value. Accordingly, the judgment entered by the trial Court pursuant to the mandate of the Supreme Court of Florida in that appeal stands at $187,411.00.

the jury's verdict in the father's suit for only $70.00 less than that requested.

At two different times during the trial, petitioner's counsel moved the trial Court for a mistrial based on the impropriety of such inflammatory and prejudicial remarks and conduct but the trial Judge denied the first motion and did not even rule on the second. Petitioner's counsel also objected repeatedly during the trial to the impropriety of such remarks and moved the trial Judge to strike them from the record. The trial Court allowed most of the remarks to stand and never charged the jury sufficiently to remove the effect of such remarks from the jury's minds. In fact, the cumulative effect of such remarks could not possibly have been erased from the jurors' minds. For example, at the very beginning of the trial and during the opening argument, respondents' counsel stated, "we are going to prove their *criminal* negligence was responsible for this little eight-year-old boy losing his leg" (emphasis supplied) (R-114). The complaint did not charge criminal negligence and, therefore, there was and could be no basis in the pleadings for such a statement. Then, in his closing argument, respondents' counsel came back to his criminal negligence theme and, referring to his opening statement said, "I told you at that time that I thought this was a case of *criminal* negligence" (emphasis supplied) (R-129). Upon objection by petitioner's counsel the trial Court simply told respondents' counsel, "Go ahead" (R-130), whereupon respondents' counsel said, "I repeat that in my opinion this railroad and their employees are guilty of *criminal* negligence (emphasis supplied (R-130), and a short time later he said, "I repeat again it is *criminal* negligence, and that is all it is. (emphasis supplied) (R-132).

From the opening statement through the closing argument respondents' counsel was allowed by the trial Court to make prejudicial and highly improper side remarks in the presence of the jury with impunity and to create a courtroom atmos-

phere so completely hostile to petitioner that it could not possibly obtain a fair and impartial trial. Illustrative is the instance during the examination of the very first witness, when petitioner's counsel objected to the introduction of a map of the situs on the ground that it was not an accurate and faithful reproduction of the area as of the date of the accident. Respondents' counsel stated in the presence of the jury:

> "Your Honor, I think that is one of the most absurd arguments I have ever heard. Unfortunately we did not know the accident was going to happen, *although I can't say it is strictly true of the Seaboard.* I don't know if they have a survey of that crossing or not" (emphasis supplied) (R-115).

When petitioner's counsel objected to such reflection on the petitioner, respondents' counsel retorted, *"This entire case is a reflection on the Seaboard"* (emphasis supplied) (R-115). Then, just a few minutes later, during the interrogation of the second witness, respondents' counsel, with absolutely no basis therefor in evidence and for no apparent reason other than to prejudice the attitude of the jury against petitioner, said, "I will show you a false affidavit of Seaboard Air Line right here". (R-115) Further, after the trial Court had sustained an objection thereto and instructed him not to make extraneous remarks, respondents' counsel persisted and said, "Maybe he would like to see this. I would like to give him this false affidavit right now" (R-116). When the trial Court then told the jury not to consider the latter remarks, respondent's counsel, apparently nettled by the Court's mild rebuke and clearly demonstrating that he would brook no contradiction or interference from the Court or anyone else, came right back and said, "We will come back to that" (R-116). Then, while questioning the petitioner's engineer on the railroad's rules governing switching movements and after conceding that the movement being made by the switch engine at the time of the accident was not a switching movement,

when the witness asked, "What does that have to do with the move I was making?" (R-120), respondents' counsel responded, "I will tell you if you want me to answer. A little boy wouldn't have lost his leg" (R-120). Then, in the redirect examination of Dr. E. W. Cullipher, a witness for respondents' and referring to the cross-examination of this witness by petitioner's counsel, respondents' counsel asked this highly improper question, "Mr. Julian also said he thought maybe this injury might stimulate this boy—his future. *Do you recommend that children's legs be cut off to help them be a success in life?* (emphasis supplied) (R-121). And a few minutes later, in questioning the petitioner's conductor on an operating rule forbidding crew members to ride on the front of the engine, respondents' counsel posed this highly improper and argumentative question, "I want to ask you to find that rule for me. You don't mean to leave the impression here in this courtroom that you and the seaboard Air Line consider the safety of the men on the crew paramount to the safety of an eight-year-old child, or children in elementary school, do you?" (R-122). A short time later, while petitioner's counsel was interrogating witness Harold A. Brown, the owner and manager of a personnel employment service, petitioner's counsel asked the witness, "And Shaw Bros. Oil Company, Standard Oil Company, and People's Water & Gas Company—all have that policy of not employing anybody with any physical handicaps?" (R-123) and the witness replied, "And Pan American Airways" (R-123), at which time respondents' counsel, although not on the witness stand or even interrogating the witness, interjected the remark, "*You can add Seaboard*" (emphasis supplied) (R-123). All of the foregoing remarks were made in the presence of the jury.

From the opening statment by respondents' counsel to the conclusion of the trial of these cases the record shows repeated inflammatory and prejudicial remarks by respondents' counsel intended to poison the minds of the jurors against the petitioner and obviously calculated to elict sympathy,

passion and prejudice. The portion of the Record entitled "Improper Remarks and Argument by Plaintiffs' Counsel" (R-114) is not all inclusive, as the prejudicial conduct appears throughout the record and is difficult to summarize in reasonable compass.

In some instances the trial Court mildly rebuked respondent's counsel for his "excessive enthusiasm", as the Court characterized it, and in other instances the rulings of the trial Court actually were such as to create the impression on the part of the jury that the objectionable and inflammatory remarks of respondents' counsel had the Court's full judicial sanction and approval. Even in those instances when the trial Court *did* mildly remonstrate with respondents' counsel for his "excessive enthusiasm", the prejudicial effect of the remarks made had already taken its toll. The poison had been spread and it was impossible to completely blot the animosity from the minds of the jurors by a simple instruction to them that they should disregard the remarks and not consider them in arriving at a verdict.

Petitioner has consistently contended that its constitutional right to a fair and impartial trial was denied in these cases, as is evidenced by its motion for a mistrial on the opening of the fourth day of the trial, such motion and the ruling thereon being as follows:

(R-87)

> "Mr. Cotton: We would like to move for a mistrial and the grounds are that counsel has prejudiced the jury by the innumerable remarks from his opening statement right down to the time that your Honor commented on the matter yesterday. Almost every 15 minutes there was something that was improperly done in this case, if your Honor please.
>
> "Mr. Julian: Arguing with witnesses, turning to the

jury and making speeches to the jury in the course of the examination of witnesses, and in his opening statement telling the jury that we were guilty of criminal negligence, whereas there is no allegation of criminal negligence, there is no allegation even of wanton gross negligence, and I think it has been highly prejudicial.

"The Court: There were some improper remarks made, but I cautioned the jury on them. I have been watching juries for many years. Mr. Frates in his excessive enthusiasm did go out of bounds, but it might have prejudiced the jury in your favor. I don't know. I will deny your motion for a mistrial".

Such contention was again reflected in petitioner's second motion for a mistrial made in the presence of the jury and during the afternoon of the fourth day of trial, which motion was not even ruled upon by the trial Court and appears in the record as follows:

(R-128)

"Q. (By Mr. Frates) You just stood there and talked with them—Mr. Bailey doing most of the talking?
"A. Mr. Bailey did all the talking.
Q. He is a pretty persuasive fellow too.
"Mr. Julian: I object to that.
"Mr. Frates: I withdraw that.
"Mr. Julian: I ask the jury be instructed.
"The Court: We will strike that last remark.
"Mr. Cotton: I have got to again move for a mistrial in this case. Counsel keeps on making those kind of remarks.
"Mr. Frates: I think I was trying to compliment Mr. Bailey. I am sorry, and apologize. I think he is a fine fellow.

"The Court: Don't take Mr. Bailey's persuasiveness into consideration".

And the contention by petitioner that it had been denied its constitutional right to a fair and impartial trial was again made in identical grounds 5 of the motions for new trial in each case; in identical grounds 6 and 24 of the motions for new trial in the Virgil Braddock and James M. Braddock cases, respectively; and in identical grounds 7 and 27 of the motions for new trial in the Virgil Braddock and James M. Braddock cases, respectively, as follows:

(5) (5)

"The Court erred in denying the motions of the Defendant, Seaboard Air Line Railroad Company, for a mistrial".

(6) (24) -

"The conduct of counsel for the Plaintiff was so grossly improper and highly prejudicial that its evil influfluence could not be eradicated from the mind of the jury by any admonition".

(7) (27) -

"The jury in considering the case acted from sympathy, passion, prejudice or mistake".

This same contention was made in petitioner's assignments of error numbered 5, 6, and 7 in the Virgil Braddock case (R-142) and petitioner's assignments of error numbered 5, 6 and 15 in the James M. Braddock case (R-146).

This contention was again presented by petitioner's main brief in the Court below and was documented by the inclusion of Article I of the Fourteenth Amendment to the Constitution

of the United States as part of the appendix to petitioner's main brief (R-151). The contention was again raised in petitioner's reply brief and the petition for rehearing (R-388). The contention was noted and approved in the dissenting opinion of the Supreme Court of Florida (96 So. 2d 127, 129).

FEDERAL QUESTION RAISED

The petitioner's motions for mistrial, motions for new trial, main brief and appendix thereto, reply brief and petition for rehearing, together with the dissenting opinion of the Supreme Court of Florida, all show petitioner's persistent assertion throughout this litigation that it has been denied its right to a fair and impartial trial, as guaranteed by Article I of the Fourteenth Amendment to the Constitution of the United States.

REASON FOR GRANTING THE WRIT

Petitioner urges the Court to grant this petition for writ of certiorari to the Supreme Court of Florida for the following reason:

The per curiam affirmances of the judgments by the Supreme Court of Florida denied petitioner its right to a fair and impartial trial, as guaranteed by Article I of the Fourteenth Amendment to the Constitution of the United States. The conduct of respondents' counsel in the trial of these causes created an atmosphere in the courtroom completely foreign to the fairness, impartiality and justice which have been demanded of judicial proceedings in the United States. The conduct and remarks of respondent's attorney and the resulting denial of petitioner's rights, as guaranteed under the Federal Constitution, by both the trial Court and the Supreme Court of Florida, were in direct contradiction to this Court's holding in *New York Central R. R. Co.* v. *Johnson* (1929) 279 U. S. 310, 73 L. Ed. 706. The Supreme Court of Florida not only ignored the *New York Central* case but,

even further, affirmed the instant judgments in direct and unexplained repudiation of its own recent holdings in *Loftin, et al.* v. *Howard* (Fla. 1955) 82 So. 2d 125; *Seaboard Air Line R. Co.* v. *Ford* (Fla. 1957) 92 So. 2d 160; *Seaboard Air Line R. Co.* v. *Holt* (Fla. 1957) 92 So. 2d 169; *Tampa Transit Lines, Inc.* v. *Corbin* (Fla. 1953) 62 So. 2d 210; *Seaboard Air Line R. Co.* v. *Strickland* (Fla. 1955) 88 So. 2d 519, and *Griffith* v. *Shamrock Village, Inc.* (Fla. 1957) 94 So. 2d 854.

In each of these cases the Supreme Court of Florida specifically held that conduct and remarks of a trial attorney, none of which was as brazen as those of which respondents' counsel in the instant cases was guilty, deprived the opposing party of its right to a fair and impartial trial.

The grossly prejudicial atmosphere in which these cases were tried was so conspicuous that Associate Justice Ogilvie was impelled to file a dissenting opinion in which he said in part, 96 So. 2d 127 at page 129:

> "Through the entire trial the record discloses numerous incidents between counsel wherein improper and prejudicial remarks were made in the presence of the jury in favor of the plaintiffs and against the defendants. More than once the trial court erred in not properly charging the jury to eradicate the matter from the minds of the jurors and that they should not consider the same. Even in instances where the trial court sustained objections, the matter was not sufficiently charged out of the minds of the jury; and on one or two occasions it could not possibly have been done due to the highly prejudicial nature of the matter. The verdict was not arrived at by the fair and unimpassioned deliberation of the jury—the verdict was influenced by an appeal to prejudice and sympathy. This Court on numerous occasions has reversed judgments because of such matters. Further exposi-

tion here is unnecessary; reference to this Court's decision in the following recent case will suffice. Seaboard Air Line Railroad Company vs. Strickland, 88 So. 2d 519".

So bitter and passionate an attack on petitioner in the presence of the jury, under circumstances tending to stir the resentment and arouse the prejudice of the jury, and so plainly designed to influence the jury's ultimate consideration of the case, was such a violent departure from the right of petitioner to a fair and impartial trial as to necessitate a reversal of the judgments below and the awarding of a new trial.

In *New York Central R. R. Co.* v. *Johnson, supra*, this Court said:

"Respondents urge that the objections were not sufficiently specific to justify a reversal. But a trial in court is never, as respondents in their brief argue this one was, purely a private controversy. . . . of no importance to the public'. The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice. See Union P. R. Co. v. Field, 69 C. C. A. 536, 137 Fed. 14, 15; Brown v. Swineford, 44 Wis. 282, 293, 28 Am. Rep. 582. Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error. Brasfield v. United States, 272 U. S. 448, 450, 71 L. ed. 345, 346, 47 Sup. Ct. Rep. 135".

This same type of conduct has been before the Federal Courts on numerous occasions and has invariably been condemned. See *Atlantic Coast Line R. Co. v. Kammerer* (CCA 5, 1953) 205 F. 2d 525; *Atlantic Coast Line R. Co.* v. *Kammerer* (CCA 5, 1955) 218 F. 2d 149, certiorari denied 349 U. S. 922, 99 L. Ed. 1254; *Robinson* v. *Pennsylvania R. Co.* (CCA 3, 1954) 214 F. 2d 798; *U. S.* v. *American Die & Instrument Works, Inc.* (CCA 3, 1954) 213 F. 2d 731.

One of the fundamental, and we submit the most important, concepts that underlies our judicial system is that Courts shall be neutral and juries free from appeals to passion that will substitute bias for reason as the approach to verdicts. If the abuses which permit this are not halted, they can only lead to misconduct which will pervert the basic foundation of the administration of justice and eventually destroy the constitutional right to a fair and impartial trial, the protection of which, as this Court made clear in *New York Central R. R. Co.* v. *Johnson; supra*, is not merely a matter of private controversy but is of vital public interest. That, if the judgment below is allowed to stand, future litigants will feel free to follow the example of respondents' attorneys in the instant cases cannot be doubted when the dissenting opinion below is read and it is remembered that these cases have had untold publicity, not only among the legal profession but among the general public. Unless the per curiam decision of the Supreme Court of Florida is reversed, it cannot fail, whether so intended or not, to invite and encourage ethical standards which transcend the bounds of fair and proper advocacy.

CONCLUSION

We earnestly submit that this question is of such grave importance as to warrant this Court to grant this petition for certiorari and, by reversing the judgments below, to assure to all future litigants that they have

a fundamental right to a fair and impartial trial, free from the abuse, bigotry and inflammatory appeals to passion, sympathy and prejudice which have characterized these cases.

Respectfully submitted,

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I CERTIFY that on this 4th day of October, 1957, all adverse counsel representing all respondents have been served under Rule 33, Paragraph 1, by depositing a copy of this petition in a United States Post Office, properly addressed to each of them, with postage affixed for delivery.

JOHN S. COX,

One of the Attorneys for Petitioner.

OPINION OF THE SUPREME COURT OF FLORIDA

FILED May 11, 1955.

APPENDIX I.

IN THE SUPREME COURT OF FLORIDA

VIRGIL BRADDOCK,

Appellant,

v.

SEABOARD AIR LINE RAILROAD COMPANY,

Appellee.

JAMES M. BRADDOCK,

Appellant,

v.

SEABOARD AIR LINE RAILROAD COMPANY,

Appellee.

Supreme Court of Florida.

Special Division B.

May 11, 1955.

Rehearing Denied June 20, 1955.

Orders reversed with directions.

Nichols, Gaither, Green, Frates & Beckham and Wm. S. Frates, Walter H. Beckham, Jr., and Sam Daniels, Miami, for appellant.

Smathers, Thompson, Maxwell & Dyer, Miami, and Fleming, Jones, Scott & Botts and Charles R. Scott, Jacksonville, for appellee.

PATTERSON, Associate Justice.

On the afternoon of March 25, 1953, James M. Braddock, an eight year old schoolboy, was riding his bicycle home from school in the city of Miami. As he crossed defendants' tracks near his school he was run over by one of defendants' locomotives, suffering the loss of his left leg.

The injured youth and his father, Virgil Braddock, each brought an action against the defendant and in a consolidated trial the jury returned verdicts of $248,439.00 for the son and $6,500.00 for the father. The trial judge set both verdicts aside and ordered new trials because of the refusals of the plaintiffs to enter remittiturs of $123,431.05 and $4,349.80, respectively.

The verdicts were filed on June 26, 1953. After hearing argument on motions for new trial the trial judge entered an order of remittitur in each case on October 7, 1953. The James M. Braddock order read:

> "1. That the jury, in its verdict, allowed the exact amount claimed by the plaintiff in the argument. Those figures for pain and suffering, inability to lead a normal life, humiliation and embarrassment and future medical, I find a little high, but the Court is loath to substitute its judgment for that of the jury.
>
> "2. The items for future pain and suffering, humiliation and embarrassment, inability to lead a normal life and loss of earning capacity were apparently in the exact figures claimed in the argument by plaintiff. This shows clearly that the jury did not take into account the Court's instruction as to reducing this to present worth. The statutes do not give a table for the present worth from age eight on, the age of this boy at the time of trial, but the Court secured from an act-

uary the figures of the present worth of $1.00 per annum. Annuity at age eight is 23.55. Multiplying that by $1,825.00 per year gives the present worth of the sums allowed for pain and suffering, humiliation and embarrassment and inability to lead a normal life in the sum of $42,978.75 as the present worth, $1,825.00 being the total amount divided by fifty-six years. The jury apparently allowed $121,000.00 for loss of earning capacity. While this is problematical and there may be no diminution of earning capacity, and, in fact, it could be increased by change of occupation yet the jury so found. Since the plaintiff should begin to earn at twenty-one years of age, according to the figures of the plaintiff's attorney, his loss should be $2,650.00 per year. Multiplying that by the present worth at age twenty-one of $21,808, we find the figure of $56,790.20. Adding all of these figures together, we reach the sum of $123,431.05. Subtracting the sum of $125,007.95 leaves a difference of $123,431.05.

"If the plaintiff will enter a remittitur in the sum of $123,431.05, a new trial will be denied. Otherwise, a new trial will be granted."

The Virgil Braddock order read:

"The jury in this cause rendered a verdict of $6,500.00. In their verdict for the plaintiff, James M. Braddock, in case No. 28,126, which was tried simultaneously with this cause, the jury allowed for all future medical expenses, and naturally this item should not be allowed twice.

"The difference between the medical expenses to date and the future medical expenses is $4,349.80. If the plaintiff will enter a remittitur in the sum of $4,349.80, a new trial will be denied. Otherwise, a new trial will be granted."

The plaintiff in each case having declined to enter remittitur pursuant to the orders of October 7, the matter was heard on motion of defendant on October 15 and orders granting a new trial in each case were entered. In the James M. Braddock case the order read:

> "This cause came on before me upon the Defendants' Motion for Order Granting Motion for New Trial, and it appearing to the court that on the 7th day of October, 1953, the court entered an order stating, 'If the Plaintiff will enter a remittitur in the sum of $123,431.05, a new trial will be denied. Otherwise, a new trial will be granted'; and it further appearing to the court that no such remittitur has been entered by the Plaintiff, and the matter having been argued by counsel for the respective parties, and the court being fully advised in the premises, it is thereupon,
>
> "Ordered and Adjudged that a new trial be and it hereby is granted."

In the Virgil Braddock case the order read:

> "This cause came on before me upon the Defendants' Motion for Order granting Motion for New Trial, and it appearing to the court that on the 7th day of October, 1953, the court entered an order stating, 'If the Plaintiff will enter a remittitur in the sum of $4,349.80, a new trial will be denied. Otherwise, a new trial will be granted'; and it further appearing to the court that no such remittitur has been entered by the Plaintiff, and the matter having been argued by counsel for the respective parties, the court being fully advised in the premises, it is, thereupon,
>
> "Ordered and Adjudged that a new trial be and it hereby is granted."

Each case is here on appeal by the plaintiff below, taken from the order of October 15, under provisions of Secs. 59.04, 59.06 and 59.07(4), Florida Statutes, F. S. A.

It must be noted that the James Braddock case is unique in that the jury awarded damages in the exact amount argued and requested by plaintiff's counsel based upon a detailed itemized breakdown of the various elements of damages demanded, which itemized breakdown was graphically displayed to the jury on a large placard during counsel's summation. And so it was in the Virgil Braddock case, except that the jury returned an even $6,500.00 rather than $6,570.00 demanded. Upon this unusual aspect of the verdicts, both counsel, as well as the trial judge, have proceeded under the assumption that the aggregate verdict in each case constitutes an award of each particular item of damage as contended for and calculated by plaintiff's counsel. We think such an assumption as realistic and reasonable and affords a proper basis for an analysis of the verdicts, both in the court below and on appeal here.

At the outset we examine the orders appealed from in the light of Sec. 59.07(4) and the contention of defendant that inasmuch as only the orders of October 15 are appealed from, no errors or defects in the amount of remittiturs fixed by the orders of October 7 may be considered. We are mindful that no ground will be considered on an appeal from an order granting a new trial except that designated in such order by the trial court as the ground upon which the motion was granted. However, reading the two orders in each case together, we think that each complements the other and together constitute the court's action on defendant's motion. The orders of October 7 did not dispose of the motion, and by reference to them in the orders of October 15 the court has specifically designated the precise ground on which the later orders rest, as required by the statute. We are left in no doubt of his grounds thus expressed, and the two orders to-

gether fix the limits of inquiry on review.

We first, then, consider the orders in the Virgil Braddock case. Admittedly the father's verdict of $6,500.00 is composed entirely of medical expenses to the date of the trial plus future medical expenses until the son reaches majority. None of the items is charged to be excessive, nor is it contended that they are improper as elements of damage to be allowed the father. The only ground for the order for remittitur of the future medical expenses was that such expenses to the son's majority had also been allowed in the son's verdict, and constitute an unauthorized double recovery against defendant. Plaintiff contends no such allowance was made to the son; hence the order for remittitur by the father was erroneous. Our study of the calculation of the son's verdict leads us to the same conclusion. For the reason mentioned earlier, the record reveals the preicse calculation of future medical expenses of the son. The record reveals without dispute that the son's life expectancy at the date of trial was fifty six years, and his life expectancy beyond majority was 44 years. Each item of future medical expenses allowed the son was calculated on the basis of 44 years duration, a fact conceded by defendant. One item, bi-weekly visits for limb adjustment, calculated on 56 years' duration, is shown by the record to be an allowance, not for the expense, but for the inconvenience and annoyance involved. No corresponding item appears in the calculation of the father's damages. We must therefore conclude that such future medical expenses as were allowed the son were medical expenses to be incurred after the son's majority. We think the record makes it clearly apparent that the trial court was mistaken in the impression that future medical expenses allowed the father were duplicated in the son's verdict. No other reason having been designated in the order granting new trial, such order is therefore erroneous and must be reversed for entry of an order denying new trial in the Virgil Braddock case.

We next consider the order granting a new trial in the James M. Braddock case. Reading together the orders of October 7 and October 15 it is manifest that the trial court approved the verdict against every ground of the motion for new trial except the failure of the jury to reduce future damages to a present money value. His calculation of the remittitur was intended to rectify that omission. The order itself reveals the basis for the calculation. Plaintiff concedes that the allowance of $121,000 for loss of future earning capacity should properly be reduced to present value but finds in the trial court's calculation an error of $3,181.20 by reason of the court's use of the amount of $2,650 as the future yearly loss rather than a loss of $2,750 per year "according to the figures of the plaintiff's attorney" and actually found by the jury, based on the assumption we have previously mentioned. We agree with plaintiff that the court did so err and that his error was one of mathematical miscalculation clearly revealed in the record. The aggregate loss of future earnings of $121,000, which the trial court accepted, was based upon 50% loss of annual earnings of $5,500 beginning at age twenty-one. It is obvious the court accepted and intended to use those findings rather than to substitute an earning figure of his own. Carrying out the court's own calculation from there, we find the present value of loss of future earning capacity to be $59,972.00 rather than $56,790.20 used in the order. The miscalculation produces the error of $3,181.20.

The Court's calculation of the remittitur is further challenged on the ground that it applies the present worth rule to damages for future pain and suffering, humiliation and embarrassment and inability to lead a normal life. Of the total remittitur, the amount of $59,221.25 represents the reduction of such damages, designated as the "pain and suffering" items, to the present money value of an annuity aggregating, over the life expectance of the plaintiff, the amount awarded in the verdict. The substantial question thus pre-

sented is whether the present worth rule, admittedly applicable to future pecuniary loss, is applicable also to future pain, suffering and inconvenience.

There is conflict on the question in other jurisdictions. The cases are collected in annotations in 28 A. L. R. 1177, 77 A. L. R. 1451 and 154 A. L. R. 801, from which it appears that the weight of authority is against the reduction of damages for future pain, suffering and inconvenience. The reasoning against such reduction has been variously expressed, but we think it was aptly stated in Chicago & N. W. R. Co. v. Chandler, 8 Cir., 283 F. 881, 884, 28 A. L. R. 1174: "Neither the plaintiff in the case nor any one else in the world has ever established a standard of value for these ills. The only proof ever received to guide the jury in determining the amount of the allowance they should make is, broadly stated, the nature and extent of the injury, its effect and results. They are instructed to allow a reasonable sum as compensation, and determining what is reasonable under the evidence to be guided by their observation, experience and sense of fairness and right. At the best the allowance is an estimated sum determined by the intelligence and conscience of the jury, and we are convinced that a jury would be much more likely to return a just verdict, considering the estimated life as one single period, than if it should attempt to reach a verdict by dividing the life into yearly periods, setting down yearly estimates, and then reducing the estimates to their present value. The arbitrariness and artificiality of such a method is so apparent that to require a jury to apply it would, we think, be an absurdity." On the other hand, those states requiring reduction hold that reasonable compensation cannot mean anything else than present cash value.

The question has not been directly decided in this state. In Florida Dairies Co. v. Rogers, 119 Fla. 451, 161 So. 85, this Court pondered but did not decide the question in relation to statutory damages for wrongful death of a minor child.

Subsequently in Toll v. Waters, 138 Fla. 349, 189 So. 393, 395, objection was made by the defendant to a charge of the Court directing the jury: "'° ° ° and if, in considering the case, you reach the conclusion that the plaintiff, Lucile S. Waters, is entitled to damages for future pain and suffering, in fixing the amount thereof you would bear in mind and give consideration to the fact that the plaintiff is receiving a present cash consideration for damages not yet sustained'", on the ground that such charge failed to instruct the jury to reduce such future damages to their present value. The charge was approved over the objection raised, the Court being of the view that the language quoted did in effect charge that such damages should be reduced to present value. It is urged by appellees here that Toll v. Waters, supra, finally resolved the question left undecided in Florida Dairies Co. v. Rogers, supra. We do not think so. The Court was not required to consider the question in Toll v. Waters inasmuch as no objection was raised to the charge by the plaintiff, the only party who could be heard to complain on that ground. In the still later case of Renuart Lumber Yards v. Levine, Fla., 49 So. 2d 97, this Court had under consideration a verdict of $75,000 on the question whether it was excessive under the facts supporting it. Plaintiff in that case had suffered substantial loss of future earning capacity as well as substantial future pain and suffering, embarrassment, humiliation and inconveniences. Unlike in the case before us now, the Court in that case could only apply its reasonable deduction as to the amount awarded for the various elements aggregating the total verdict. The case is of value to us here only for the reason that, in its analysis of the verdict, the Court reconstructed the award for future loss of earnings by mathematical reduction of future annual earnings at 3% discount, and considered the balance of the verdict to be an unreduced award for future pain and suffering. Discussion of the proper rate of discount was obviously confined to the calculation of loss of future earnings. Thus, although the question before us was not expressly ruled upon, the suggestion is strong that

the problem of mathematical reduction to present value does not attend the determination of damages for future pain, suffering and inconveniences. And we think such suggestion is consistent with our considered view of the question presented here, and accords with the weight of authority in this country.

The rule for measuring damages for pain and suffering, past, present and future, has been often stated, and always in substantial conformity with the charge given in Toll v. Waters, supra, which we set out here in full: "'As to pain and suffering the law declares that there is no standard by which to measure it except the enlightened conscience of impartial jurors, the enlightened conscience of each of you. It would be your duty to determine from the evidence what sort of injuries the plaintiff received, if any, their character as producing or not producing pain, the mildness or intensity of the pain; its probable duration, and allow such sum as would fairly compensate her for her pain and suffering, if any, such sum as would receive the approval of the enlightened conscience of each of you, and if, in considering the case, you reach the conclusion that the plaintiff, Lucile S. Waters, is entitled to damages for future pain and suffering, in fixing the amount thereof you would bear in mind and give consideration to the fact that the plaintiff is receiving a present cash consideration for damages not yet sustained.'"

The rule does not seek to instruct the jury in the process by which they shall determine the amount of damages for pain and suffering. Jurors know the nature of pain, embarrassment and inconvenience, and they also know the nature of money. The problem of equating the two to afford reasonable and just compensation calls for a high order of human judgment, and the law has provided no better yardstick for their guidance than their enlightened conscience. Their problem is not one of mathematical calculation but involves an exercise of their sound judgment of what is fair

and right. The problem is often further complicated by the fact that the pain and suffering are yet to be suffered and thus even further removed from exact calculation and certain measurement. But such further uncertainty does not change the problem from one of judgment to one of calculation. It still rests within the enlightened conscience of the jury. We think, therefore, that the aspect of present compensation for future pain is merely one of the subjective elements of the problem, and is not a process of mathematical calculation of present value, such as must be applied to periodic future pecuniary losses. We think, as has been said by others, that to treat future pain and suffering as the loss of an annuity is an absurdity. Viewing the trial court's reduction in the light of our view of the rule, we are persuaded that the reduction is erroneous and should be restored. We note here that the Court considered and expressly rejected the contention that the verdict is excessive. It thus appears that the reduction was not intended as an exercise of the Court's discretion to reduce an excessive verdict, but was instead an intention of the Court to carry out what the Court perceived to be an omission by the jury to perform a mandatory requirement of a mathematical reduction of future worth of prospective pain and suffering to a present value. This we think the Court cannot properly do for the reasons we have already indicated. Since the element of present recompense for future damages is only one subjective element in the determination of these items of damages by the jury, to superimpose the reduction upon the jury's idea of just compensation, which is expressly found not to be excessive, merely in obedience to a rule of damages we find not to be applicable, is patently not an exercise of discretion in granting a new trial, but a clear misapplication of law.

In this connection we are constrained to note, however, that the trial Court was in all likelihood strongly persuaded by the unusual fact in this case that it conclusively appears that the total figure for future pain, suffering and inconveni-

ence was arrived at by an assessment of five dollars per day for the duration of plaintiff's expectancy. The method of counsel's argument to the jury by which the damages are broken down into per diem assessment was neither challenged nor disapproved in the court below, and we are not required to pass upon it here. If it be considered to be deceptive and to produce an excessive verdict, the court, in a proper case, and in the exercise of sound discretion to prevent injustice by excessive verdicts, may so find and order an appropriate remittitur. But we think that neither counsel's summation nor the jury's method of assessment will justify the application of the present worth rule to future pain and suffering.

We think therefore that the remittitur ordered by the trial court was erroneous in the particulars mentioned and that the errors arise from miscalculation and misapplication of law rather than an exercise of judicial discretion. Under such circumstances we feel obliged to correct the remittitur on this appeal and thus afford the plaintiff his election to enter a correct remittitur or to accept a retrial.

In view of the limited scope of review of orders granting new trials, the question of the excessiveness of the verdicts is neither decided nor precluded by this appeal.

The order granting a new trial in the Virgil Braddock case is reversed and the Circuit Court is hereby directed to enter a final judgment in the sum of $6500 in favor of Virgil Braddock bearing interest from June 20, 1955, the date of the former mandate in this cause. The order granting new trial in the James M. Braddock case is reversed with directions to enter a remittitur in the sum of $61,028.00 and thereupon enter a final judgment in the sum of $187,411 in favor of James M. Braddock, bearing interest from July 6, 1955, the date of the appellant's entry of remittitur herein.

TERRELL, Acting C. J., and SEBRING and HOBSON, JJ., concur.

OPINION OF THE SUPREME COURT OF FLORIDA

FILED May 8, 1957.

APPENDIX II.

IN THE SUPREME COURT OF FLORIDA

SEABOARD AIR LINE RAILROAD COMPANY,

Appellant,

v.

VIRGIL BRADDOCK,

Appellee.

SEABOARD AIR LINE RAILROAD COMPANY,

Appellant,

v.

JAMES M. BRADDOCK,

Appellee.

Supreme Court of Florida, En Banc.

May 8, 1957.

Rehearing Denied July 11, 1957.

Affirmed.

Claude Ogilvie, A. J., dissented.

See also Fla., 80 So. 2d 662.

Smathers, Thompson & Dyer, Miami, and Fleming, Scott & Botts, Jacksonville, for appellant.

Nichols, Gaither, Green, Frates & Beckham, William. S. Frates, Walter H. Beckham, Jr., and Sam Daniels, Miami, for appellee.

PER CURIAM.

Affirmed.

TERRELL, C. J., and THOMAS, HOBSON, DREW, THORNALL and O'CONNELL, JJ., concur.

OGILVIE, Associate Justice, dissents.

CLAUDE OGILVIE, Associate Justice (dissenting).

These two suits arose out of a railroad crossing accident wherein child's leg was amputated below the knee. Father and child brought separate actions; and lower court granted new trials on sole ground of plaintiff's refusal to enter remittiturs. This Court on the former appeals held that trial court was in error in its computation of amounts to be remitted; saying:

> "° ° ° We are mindful that no ground will be considered on an appeal from an order granting a new trial except that designated in such order by the trial court as the ground upon which the motion is granted. ° ° ° "[Par. 9.] In view of the limited scope of review of orders granting new trials, the question of the excessiveness of the verdicts is neither decided nor precluded by this appeal" [80 So. 2d 665.]

The lower court entered final judgments in favor of the plaintiffs according to mandates correcting the computations of remittiturs in the two cases. And from these final judgments the railroad company brings these appeals, raising questions that were not and could not be considered on the previous appeals. See 80 So. 2d 662.

The jury awarded the eight and one-half year old boy $248,-439 for the amputation of the leg below his knee; and in the father's suit for loss of services and medical expenses he was awarded a verdict of $6,500. The chief complaint by the railroad company is the excessiveness of the boy's verdict; and several charges of improper and highly inflammatory remarks by counsel for plaintiffs in the presence of the jury are cited for grounds of reversal.

In the opening statement before the jury, counsel for plaintiffs stated that "we are going to prove to you that not only were they negligent, but that the criminal negligence of this railroad * * * We are going to prove that their criminal negligence was responsible for this little boy losing his leg * * *". And again in his closing argument to the jury, over the objection of defendants, the plaintiffs' counsel repeated his charge that the railroad company was guilty of criminal negligence. As a ruling on the objection the trial judge merely told plaintiffs' counsel to "go ahead". And again, he did "go ahead" by saying at least twice more, "I repeat that in my opinion this railroad and their employes are guilty of criminal negligence". The complaint does not allege criminal negligence, nor does it allege any wilful or wanton act of negligence, nor does it allege any wilful or wanton act of negligence against the defendants; no punitive damages were sought.

Again, when plaintiffs' first witness was on the stand, railroad counsel objected to the introduction of a survey of the situs on the ground that it was not a faithful reproduction of the physical facts; and immediately following such objection, the following colloquy ensued:

> "Mr. Frates: Your Honor, I think that is one of the most absurd arguments I have ever heard. Unfortunately we did not know the accident was going to happen, although I can't say it is strictly true of the

Seaboard. I don't know if they have a survey of that crossing or not."

"Mr. Julian: We object to that observation—the reflection on the Seaboard."

"Mr. Frates: This entire case is a reflection on the Seaboard."

"Mr. Julian: I would like for counsel to address his remarks to the Court."

The Court merely announced that the objection was sustained, but made no effort to charge the jury to not consider same.

Through the entire trial the record discloses numerous incidents between counsel wherein improper and prejudicial remarks were made in the presence of the jury in favor of the plaintiffs and against the defendants. More than once the trial court erred in not properly charging the jury to eradicate the matter from the minds of the jurors and that they should not consider the same. Even in instances where the trial court sustained objections, the matter was not sufficiently charged out of the minds of the jury; and on one or two occasions it could not possibly have been done due to the highly prejudicial nature of the matter. The verdict was not arrived at by the fair and unimpassioned deliberation of the jury—the verdict was influenced by an appeal to prejudice and sympathy. This Court on numerous occasions has reversed judgments because of such matters. Further exposition here is unnecessary; reference to this Court's decision in the following recent case will suffice. Seaboard Air Line Railroad Company v. Strickland, 88 So. 2d 519.

During final argument of counsel for the plaintiff, James M. Braddock, a placard was used to visually present to the

jury the several claims or items of damages requested in the verdict, in words and figures as follows (Exhibit A, p. 652, transcript):

"Mike" Braddock

Age 9	Expectancy 56 years
Pain and Suffering to date	395 days
Pain and Suffering to date	
Experience of accident	5,000.00
Hospital 3/25-4/5/52	1,200.--
First 30 days at home	300.--
To date 353 days	700.--
Inability to Lead Normal Life	
3/25-5/31/52 crutches	340.--
6/1-10/31/52 pylon	459.--
11/1/52 to date artificial limb	348.--
Humiliation and Embarrassment	1,915.--
	10,262.--
20,440 *days*	*Future* 56 *Yrs.*
Medical	
Checkup by doctor once a year	440.--
Artificial legs	3,600.--
Repairs and Maintenance	2,650.--
Stump socks	985.--
Extra pants, shoes and socks	4,400.--
Limb adjustment every 2 weeks	2,912.--
	14,977.--

Pain and Suffering	
20,440 days	20,440. - -
Humiliation and Embarrassment	
20,440 days	40,880. - -
Inability to Lead a Normal Life	
20,440 days	40,880. - -
Loss of Earning Capacity	
5500 X 50% X 56	121,000. - -
Total	248,439. - -

The first and unusual point to be noted is that the jury returned a verdict for said minor plaintiff in the exact amount of dollars as the sum total of some eighteen itemized factors requested in the placard, viz.: $248,439. A cursory examination of the items raises the question of the overlapping of a number of said items. On the placard, and argued strenuously by counsel, were, among others, the several following items:

Pain and Suffering	
20,440 days	20,440. - -
Humiliation and Embarrassment	
20,440 days	40,880. - -
Inability to Lead a Normal Life	
20,440 days	40,880. - -
Loss of Earning Capacity	
5500 X 50% X 56	121,000. - -
Total	248,439. - -

Certainly the last several items on the placard disclose just another overstepping of plaintiff's counsel, by repetition and overlapping. I am of the opinion that the verdict for the plaintiff, James M. Braddock, was unconscionably excessive; that the verdict was not the product of fair and unimpassioned reasoning of the jury; and the same was partially induced by the placard and final argument adding at least some of the elements of damages more than once into the total requested figure of $248,439—which was the exact amount of the jury's verdict. See Loftin v. Wilson, Fla., 57 So. 2d 185, at page 190; Florida Power & Light Co. v. Watson, Fla., 50 So. 2d 543; Atlantic Coast Line Railway Co. v. Moore, 135 Fla. 485, 186 So. 210, at page 216.

Another point present here on this appeal is whether the court below erred in failing to charge the jury that the minor plaintiff could not recover if the jury find by a preponderance of the evidence that his negligence, if any, was the sole proximate cause of his injuries. It is contended by the plaintiff that substantially that law was charged, while the defendants contend that it was not. A careful reading of the charge (T. 608, 609) shows that the Court did charge on sole proximate cause, both with respect to defendant Poe and also with respect to defendant Seaboard Railroad; and the law of proximate cause was amply covered, even though not in the phraseology of the defendant railroad's requested charge.

I am persuaded here that the amount of the verdict in the James M. Braddock case was not based on an unimpassioned consideration and evaluation of the evidence "uninfluenced by the appeals of counsel to passion and prejudice"; that the trial court erred in permitting opposing counsel to engage in personalities in the presence of the jury, and failed to properly rule on objections to conduct and utterances of plaintiff's counsel in the presence of the jury which were highly prejudicial against the defendants and in favor of plaintiff, James M. Braddock. Seaboard Air Line Railroad Com-

pany v. Ford, Fla., 92 So. 2d 160, Paragraphs 7 and 8, at page 165.

The judgment in the case of Seaboard Air Line Railroad Company v. Virgil Braddock should be affirmed.

The judgment in the case of Seaboard Air Line Railroad Company v. James M. Braddock should be affirmed on the issue of liability, and should be reversed on the issue of damages. A new trial should be ordered on the issue of damages alone.

JUDGMENT OF THE SUPREME COURT OF FLORIDA

FILED May 8, 1957.

APPENDIX III.

IN THE SUPREME COURT OF FLORIDA

SEABOARD AIR LINE RAILROAD COMPANY,

Appellant,

v.

VIRGIL BRADDOCK,

Appellee.

SEABOARD AIR LINE RAILROAD COMPANY,

Appellant,

v.

JAMES M. BRADDOCK,

Appellee.

Supreme Court of Florida.

Wednesday, May 8, A. D. 1957.

These cases having heretofore been submitted to the Court upon the transcript of the record of the judgment herein, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be and the same is hereby affirmed; it is further ordered by the

Court that the Appellees do have and recover of and from the Appellant costs in this behalf expended herein taxed except the $12.00 filing fee, in each case, which has been paid by the Appellant and that all costs shall be taxed in the court in which the appeal was entered, all of which is ordered to be certified to the Court below.

The Opinion of the Court in this cause prepared was this day ordered to be filed.

APPENDIX IV.—Photograph of Placard Used In JAMES M. BRADDOCK CASE